Tackling Sectarianism Through the Criminal Law

Kay Goodall, University of Stirling

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The Scottish Government is (at the time of writing) piloting through the Scottish Parliament the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill. Its target is in effect sectarianism. Whatever form any new statute will take, the burden will remain with the justice system to decide what sectarianism is. That task will of course fall on the overworked fiscals and the lower courts. Given the recent decision by Sheriff Scott regarding a prosecution which linked an anti-Israel protest with racism, where he described the Crown's attempt "to squeeze malice and ill-will out of the agreed facts" as "rather strained",[1] Crown Office will surely find this unwelcome.

The higher criminal courts stubbornly buck responsibility for defining either religious or racial prejudice. In *Walls v Brown*, Lord Carloway observed only that there could not be "any reasonable comparison" between the Famine Song, God Save the Queen and Flower of Scotland because the Famine Song "call[s] upon people native to Scotland to leave the country because of their racial origins".[2] In *Dyer v Hutchison* the offender directed anti-English abuse against Rangers supporters. It was decided that his conduct "may not have been racist in the same way" as that of the two other appellants, who made monkey grunts and yelled "you dirty black bastard".[3] It is understandable in such an embattled and politicised area of law that both drafters and judges have been tempted to provide as little definition as they humanly can. On the other hand, the Scottish appeal courts have rather taken the biscuit.

What would adequately define Scottish sectarianism? Academics agree on one thing: it is not predominantly "about religion". Arguments then begin about what else it is a proxy for (racism; tribalism; the hidden injuries of class) and how deep it runs (history; life chances; demography). What women contribute, research has not noticed. Perhaps, some say, it might

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[1] *PF v Napier et al* (unpublished), Edinburgh Sheriff Court, Sheriff's Note issued 8 April 2010.
[2] *Walls* v *Brown* [2009] HCJAC 59, 2009 JC 375 at para 19.
[3] *Dyer v Hutchison* [2006] HCJAC 45, 2006 JC 212 at paras 27, 5 and 8.

be deemed ethno-religious. But, however plausible that might be as regards some "Protestant" offenders, can we really foist an ethno-religious motivation on "Catholic" offenders? Whatever, what no-one predicted is this spring's brutal outbreak of sectarian lawlessness related to football.

A. SECTARIANISM IN MODERN SCOTLAND

It will not help that football chanting has its own unique and subtle symbols and does not depend exclusively on crude abuse. The courts do not often find themselves bamboozled by racist thugs wandering through Pollokshields singing a menacing chant worded, say, "I love being Scottish". But in football, laudatory songs – "up the IRA" – are common and must in principle be distinguished from express prejudice – "up yours, you Fenian bastards".

The underlying problem for the law, however, is that Scottish sectarianism is not a unitary phenomenon. Unlike Northern Ireland, Scotland has pockets of football rivalry where supporters sing and yell sectarian insults, knowing that these are damaging and are banned, but barely grasping the cultural differences from which these originate.[4] Perhaps the best example of the difference between the two nations is the recent attempt at a legislative definition of sectarian in Northern Ireland. The definition of sectarian chanting proposed by the NI Human Rights Commission, and accepted by the NI Executive, was that "it consists of or includes matter which is threatening, abusive or insulting to a person by reason of that person's religious belief *or political opinion* or against an individual as a member of such a group".[5] The definition had cross-party support and failed to become law only because it was opposed by the Ulster Unionist Party.

It is hard to imagine a Scotland today where sectarian belief could be demarcated by political loyalty. Indeed religious prejudice, it seems, was not read across to include political taunts in one case where football supporters sang songs about the IRA – even though a religious aggravation in Scots law can extend even to an offence motivated by malice and ill-will "against a social or cultural group with a perceived religious affiliation, based on their

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[4] See e.g. C and R Deuchar, "Territorialities in Scotland: perceptions of young people in Glasgow" (2009) 12 Journal of Youth Studies 731 at 740.
[5] Northern Ireland Assembly, Official Report, amendment 9, tabled 3 Mar 2011 (emphasis added).

membership of that group".[6] Reference to a political organisation, whatever its meaning in the Northern Irish context, could not by itself be seen in Scotland to amount to religious prejudice.

Protestant and Catholic Scotland, as Michael Rosie explained in what remains the best recent work on the topic,[7] is a society marked by bigotry but not systematic discrimination; by clashing identities but not by separate worlds; and by spats but not warfare.[8] People do not vote for Catholicised and Protestanticised political parties. Roman Catholics in Scotland today have an even chance of settling down with someone outside their own religion.[9] As an audience member at a recent Edinburgh University evening debate asked, why are we treating football as the symptom and not the disease?

What is notable about the recent horrific history of assaults and bullets and bombs by post is that it is so atypical. The most vulnerable victims in Scotland are the visible ethnic minorities, who continue to live in greater poverty, with all the disadvantage that entails, and whose experience of criminal victimisation miserably overshadows the anti-Catholic experience. Charges with a racial aggravation amount to over 4000 a year, with the great majority of victims identified as coming from the tiny proportion of these groups in Scottish society.[10] Interviews in 2004 with 175 people who had reported racist incidents in the Strathclyde region found that more than a third described enduring such incidents so frequently, even constantly, that they could not quantify the number involved. The majority

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[6] Criminal Justice (Scotland) Act 2003 s 74. See also "Sheriff right to dismiss case against man singing IRA songs, says expert", Scotsman 30 Mar 2011.
[7] M Rosie, *The Sectarian Myth in Scotland* (2004).
[8] Compare Northern Ireland: House of Commons Northern Ireland Affairs Committee, *The Challenge of Diversity: Hate Crime in Northern Ireland, Ninth Report of Session 2004–05* (HL 2004-05, 548-I) vol I para 13.
[9] Currently the best source is C Holligan and G Raab, *Inter-Sectarian Couples in the 2001 Census* (Scottish Longitudinal Study Research Working Paper 7, 2010) para 12.
Note this is less "inter" mixing than a random assortation would create, a point most commentators omit to mention.
[10] Scottish Government, *Statistical Bulletin: Racist Incidents Recorded by the Police in Scotland, 2009-10* (2011) table 8. 2% of the population in the last census identified as "other white" and 2.5% placed themselves in the remaining minority categories: see Office of the Chief Statistician, *Analysis of Ethnicity in the 2001 Census - Summary Report* (2004). The proportion will have grown since.

experienced this abuse from different perpetrators, rather than repeat victimisation from a single source.[11]

Rosie and other social theorists have had insufficient to say, though, about the justified apprehension felt by a person who fears they may be identified with the Roman Catholic minority. There were 693 charges with a religious aggravation in the most recent annual figures released,[12] and it is unlikely to be a mere artifice of reporting and recording practices that the chances of "Roman Catholicism" being the target were (on the last occasion that the count was made public) around twice that of "Protestantism".[13] Meanwhile, much of the public debate about separate education seems unable to refrain from openly hostile victim-blaming based on no credible evidence.

The problem is not confined to football. There is anti-Catholicism and anti-Irish feeling in Scotland, albeit that we struggle even to estimate its prevalence. In particular it is wrong to imply by omission that the hostility is the same on both sides. Chants of "Prod" or "Hun" and a few breach of the peace convictions do not amount to equivalence. Scots law, however, could not successfully distinguish the two phenomena without incurring huge criticism: recognising the differences would thus inevitably be left to the fiscals and the courts.

B. A CRIMINAL SOLUTION?

So it is in the midst of all this that the SNP government introduced its new Bill. As weary practitioners and law lecturers revising their notes will be asking, is it necessary? Would it work?

The Bill, it seems, sets out largely to mortar cracks and create nominate offences.[14] The cracks are few and there is (for the most part) ample law to cover disorderly or threatening behaviour. . Explicit naming of football offences appeals to many, though, and a true gap exists in the arena of incitement to religious hatred, because it is an insult to victims to

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[11] K Goodall, R Choudri, R Barbour and S Hilton, *The Policing of Racist Incidents in Strathclyde* (2004) 10.

[12] Crown Office and Procurator Fiscal Service, "Hate crime in Scotland 2010-11" (nd), available at *http://www.copfs.gov.uk/sites/default/files/Hate Crime - publication - final version.pdf*.

[13] K Doyle, *Use of Section 74 of the Criminal Justice (Scotland) Act 2003 – Religiously Aggravated Reported Crime: An 18 Month Review* (2006) para 3.2.

[14] Offensive Behaviour at Football and Threatening Communications (Scotland) Bill, Explanatory Notes, SP Bill 1–EN 1 Session 4 (2011), 11.

subsume this under religiously aggravated breach of the peace. Defining these is a delicate job to take on. The Bill as introduced was far too flawed in either concept or construction to be fit for it. Much amending will be needed, but this could be done.

The other question however is whether new provisions will work. It has long been argued by criminologists that longer sentences do not deter crime and that policymakers do not want to know this.[15] Governments, however, must be seen to be responsive, and there are benefits to be gained from instantiating longer sentence maxima and creating new, named offences. Each time sentence enhancement provisions have been introduced in the UK, they have been marketed, sometimes primarily, as messages sent to the general public and the victims: an expressivist approach. They are sold, too, as a means of bringing about changed behaviours. One important function they also carry out is to measure and monitor offences where an aggravation has been proven. It is easily forgotten that before the introduction of police monitoring of racist incidents in Scotland, commentators were fond of announcing that Scots were too busy being sectarian to engage in something as un-Scottish as racism.[16] Records of convictions which include statutory aggravations provide further evidence not just that racially aggravated behaviour is alleged, but that it has occurred.

Nonetheless, more new legislation seems at first sight an expensive and bureaucratic way to prove there is a problem. The question therefore is whether a denunciatory message has value and whether new legislation might change these presumed sectarian behaviours. Again, orthodoxy claims not, but Phyllis Gerstenfeld has cited behavioural studies research which concludes that law can influence people to reduce overt prejudice, and that it is possible - indeed such an approach is relatively effective – to change attitudes through changing their behaviour.[17]

The old chestnut that the solution is education, education, education need not be wholly rejected, but Gerstenfeld elsewhere suggests that when a "hate" crime is carried out in search of a thrill, to gain excitement and social capital, a policy of tackling bigotry in society may not be all that productive.[18] Notably, of the cases examined in Doyle's review of the operation of section 74, 95% of the convictions were for breach of the peace. Over half were specifically recorded as involving alcohol. In 34% of the cases the target was the police, and

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[15] See especially the special issue (10(1), February 2011) of Criminology and Public Policy.
[16] See e.g. P Dimeo and G Finn, "Scottish Racism, Scottish Identities", in P Brown (ed), *Fanatics! Power, Identity, and Fandom in Football* (1998).
[17] P B Gerstenfeld, *Hate Crimes: Causes, Controls, and Controversies*, 2nd edn (2011) 209.
[18] Ibid 279.

in 45% the target was the community, suggesting disorderly conduct. Only 17% of targets were "civilians" (neither police officers nor workers in the leisure industry, transport or hospitals).[19]

Furthermore, it seems that the public may be more likely to hold favourable views of the criminal justice system when they are more informed about patterns of sentencing.[20] Even just a public discussion which provides more information about sentencing may prove useful. It matters that the public feel positive toward the criminal justice system; not least because it is they who report crimes and support the prosecution process throughout.[21] All in all, the evidence is far from conclusive, but we should give new measures a considered hearing.

Kay Goodall
University of Stirling

[19] Doyle, *Religiously Aggravated Crime* (n 13) para 3.16.
[20] J M Gay, "What shapes public opinion of the CJS?" in J Woods and T Gannon (eds), *Public Opinion and Criminal Justice* (2009) 49 at 65;
[21] G Tendayi Viki and Gerd Bohner, "Achieving accurate assessment of the attitudes toward the CJS: methodological issues", in Woods and Gannon (eds), *Public Opinion* (n 20) 96.